No. 14356

United States Court of Appeals

For the Ninth Circuit

VERN GEORGE DAVIDSON,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Petition for Rehearing

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TABLE OF CASES AND AUTHORITIES CITED

Cases

Code

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Comes now the appellant, by his attorney, and files this his Petition for Rehearing of the Judgment entered by the Court on December 27, 1954, affirming the judgment of the Court below.

Appellant reserves his argued position as to each of the points of appeal, but in this petition addresses himself solely to a feature of the decision wherein he believes the Court may be convinced its result is incorrect.

The decision should be reheard and for the following reason:

> The decision is on a single point and the Selective Service regulation used to support the conclusion reached on this point is inapplicable.

The decision is on the single point that no second Hearing Officer Hearing was required because the second appeal was "abortive" [slip opinion page 5].

The Court concluded that the second appeal was abortive because (a) it was not *from* a classification, but *for* a postponement of induction and because (b) it came too late in that it postdated an order to report for induction; 32 Code of Federal Regulations, §1626.2(d) is given as authority.

With respect to

(a) This Court has always held that a liberal construction is required of a Selective Service registrant's phraseology in letters to his draft board: *Cox vs. Wedemeyer,* 192 F. 2d 920, 923; *Talcott vs. Read,* ..... F. 2d ....., No. 14218, dec. 10/23/54, slip opinion p. 3; other courts have held likewise: See *Hufford vs. United States,* 103 F. Supp. 859, 862; *Berman vs. Craig,* 107 F. Supp. 529, 531 (Aff. by 3 Cir., 207 F. 2d 888); *Ex parte Fabiani,* 105 F. Supp. 193, 148.

It cannot be doubted that appellant's letter of "Appeal" was one asking his local board for relief. The board so understood it and also understood that an administrative appeal was his remedy. The board's construction of his letter should not be rejected unless illegal. This brings us to the next problem.

(b) A registrant's untimely request for an administrative appeal is not a nullity. If the local board believes the registrant is asking for and should have an appeal it may waive the tardiness of the request. The very section cited by the opinion, §1626.2(d), states that the local board may honor a late appeal. Since the sub-section (d) itself makes the Order to Report

for Induction the deadline, and in the same paragraph gives the local board authority to honor a late appeal it is clear that Davidson's local board exercised its authority and intended him to have an appeal.

Furthermore, the slip opinion, page 5, states:

> "The record submitted to the appeal board contained nothing new which could affect its prior decision. An alert hearing officer first saw the mistake and advised Davidson that he was not entitled to a second hearing because he had already had one."

This "alert hearing officer" did not predicate his refusal either on the basis that there was nothing new to be considered or that there had been a mistake by the local board in granting an untimely request for an appeal. His sole (and stated) basis for refusal was that Davidson had already had *one* hearing.

The measure of a registrant's rights is not "one" hearing by a Hearing Officer anymore than it is "one" hearing by his local board.* This is particularly true in Davidson's case because of the lapse of time between the hearing given and the hearing withheld.

In addition this Honorable Court was wrong in concluding that there was "nothing new" to be considered by the Hearing Officer. In a young man's life two years can make a great deal of difference in

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*"1625.13 RIGHT OF APPEAL FOLLOWING REOPENING OF CLASSIFICATION.—Each such classification shall be followed by the same right of appearance before the local board and the same right of appeal as in the case of an original classification."

his thinking, experience and attitude. The *purpose* of the hearing officer hearing is to bring out the *current* facts of the registrant's claims of conscientious objections to war. When either the local board or an appeal board classifies a registrant the decision is to be made on current facts. *Hull vs. Stalter,* 7th Cir., 151 F. 2d 633.

Congress intended that genuine religious scruples be respected. Can it be argued that the sole purpose of the Hearing Officer Hearing is to show up sham? Is not it true that part of his duty is to pierce the fog that surrounds some youngsters' verbiage? If a registrant's true beliefs always really were (or have become) "religious" is it not the Hearing Officer's function to overlook rebellious semantic disavowals made many years before and make recommendation of classification in accord with the current facts?

Wherefore, upon the foregoing grounds, and for other reasons appearing in Appellant's Brief, it is respectfully urged that a rehearing be granted in this matter, and that the mandate of this Court be stayed pending the disposition of this petition.

Counsel further represents and certifies: In counsel's judgment this Petition is well founded and is not interposed for delay.

J. B. TIETZ,
Attorney for Appellant.